MV 97-5
Tax Type: MOTOR VEHICLE USE TAX
Issue: Rolling Stock (Vehicle Used Interstate For Hire)
Pollution Control Equipment (Exemption)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF COOK

DEPARTMENT OF REVENUE	)	**No.**
STATE OF ILLINOIS	)	
	)	
	)	**NTL NO.**
	)	
v.	)	
	)	**IBT NO.**
	)	
TAXPAYER	)	
	)	
Taxpayers	)	**Mimi Brin**
	)	**Administrative Law Judge**
	)	
	)	

RECOMMENDATION FOR DISPOSITION

Appearances: Paul G. Foran, Esq. on behalf of TAXPAYER.

Synopsis:

This matter comes on for hearing pursuant to the protests by TAXPAYER, et. al., (hereinafter referred to, collectively, as the "taxpayer") to various Notices of Tax Liability (hereinafter referred to as the "Notices") issued against them. Such Notices were issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for payment of Illinois Use, Municipal Use and Regional Transportation Authority Taxes deemed to be due on the purchases of various tangible personal property used to haul household waste,

commonly referred to as garbage (hereinafter referred to as "waste" or "garbage").

Taxpayer waived its right to a hearing with respect to the instant assessments. In lieu of calling witnesses and offering evidence at a hearing the taxpayer submitted a brief with appended affidavits and exhibits setting out its legal position. These documents constitute the taxpayer's attempt to rebut the *prima facie* correctness of the Department's assessment. Taxpayer further waived the necessity of having the Department place the correction of returns and/or the Notices of Tax Liability into evidence establishing the *prima facie* correctness of the liabilities set forth in the pertinent assessments.

Following the filing of taxpayer's brief, etc., in case no. XXXXX, an order was entered, on April 23, 1996 (hereinafter referred to as the "Order"), which, *inter alia*, incorporated case no. XXXXX with the prior matter. That order provided that this consolidated cause would be determined pursuant to a Stipulation of Facts entered into by the parties on April 26, 1996 as well as on taxpayer's Motion For Reconsideration and Consolidation, Supplemental Motion For Reconsideration And Consolidation, Second Supplemental Motion For Reconsideration & Consolidation, Third Supplemental Motion For Reconsideration And Consolidation[1] and the affidavit of TAXPAYER,

[1]. The subjects of the Motion For Reconsideration and Consolidation, Supplemental Motion for Reconsideration and Consolidation, Second Supplemental Motion for Reconsideration & Consolidation, and Third Motion for Reconsideration and Consolidation are assessments and/or Notices of Demand and/or Notices of Intent to Levy on particular equipment owned by any one of the named taxpayers herein, all issued after the XXXXX matter was in these administrative proceedings.

dated April 25, 1996. In addition, as a result of the Order and the Supplemental Motions and Affidavit, additional Notices of Tax Liability and audited, but unassessed equipment which had yet to be assigned a specific case number were also incorporated into these two docketed matters.[2]

Regarding the assessments which were assigned case no. XXXX, the parties have stipulated that these are for equipment already assessed in case XXXXX. Stipulation of Facts, April 26, 1996, ¶¶ 4, 6, Appendix C The parties have further stipulated that the assessments and equipment, which are the subject of taxpayer's various motions for reconsideration and consolidation, are also all duplicative of equipment assessed in case XXXXX. Stipulation of Facts, April 26, 1996, ¶¶ 3, 6, Appendix B

The parties agreed that all of the vehicles assessed fall into the same categories and are used in the same manner as set forth in case no. XXXXX. Stipulation of Facts, April 26, 1996 ¶ 7; Affidavit, TAXPAYER, April 25, 1996 As such, the parties provide that the testimony and evidence set forth therein shall apply in these consolidated matters. *Id*.

The issues herein concern whether the various items of tangible personal property assessed are exempt from taxation under the Illinois Use Tax Act (35 **ILCS** 105/1 *et seq*.) (hereinafter referred to as the "UT" or the "UTA") as either the rolling stock of an interstate carrier for hire (35 **ILCS** 105/3-60) or as pollution control facilities (35 **ILCS** 105/2a). Following the submission of all

[2]. See attachments to motions for reconsideration and consolidation.

evidence and a review of the record, it is recommended that the issues be resolved in favor of the Department with the exception of Notice of Tax Liability XXXXX for a shredder/trailer, for which tax was paid to the Department.

Findings of Fact:

Based on the exhibits admitted of record, the following findings of fact are made:

1. Under the provisions of Sections 4, 5 and 6(b) of the Retailers' Occupation Act (35 **ILCS** 120/1 *et seq*.) as incorporated by reference into the Use Tax Act (35 **ILCS** 105/1 *et seq*.) pursuant to Section 12 of that statute and as those sections may be incorporated into other taxing acts, the Department established the *prima facie* correctness of the assessments at issue, by the agreement of the parties.

2. The taxpayer waived its request for a formal hearing in this matter and submitted, in lieu of same, a brief with appended affidavits and exhibits. Taxpayer Brief; Taxpayer Affidavit; Taxpayer Supplemental Affidavit; Taxpayer Ex. No. 1-27

3. Taxpayer collects and removes garbage from its customers' sites and removes such to its own transfer stations in Illinois, from which the unrecyclable garbage is transported to disposal sites both within and without the State of Illinois. Affidavit, TAXPAYER, pp. 5, 6, 7, 8, 9, 10; Supplemental Affidavit, pp. 2; Taxpayer Ex. No. 26, 27

4. The taxpayer purchased and the Department assessed, the following categories of tangible personal property (hereinafter

collectively referred to as "Transportation Equipment" or "Equipment"):

a) Packer trucks into which garbage is collected and transported from the generator site (customer location) to taxpayer's transfer station facilities located in Illinois. Taxpayer Ex. 16; Taxpayer Brief, pp. 12-13

b) Tractors (Power Units) which transport all of the combined waste from taxpayer's own transfer station facilities to the ultimate disposal sites. Taxpayer Ex. No. 16; Taxpayer Brief, pp. 13, 14

c) Transfer trailers which transport large loads of bulky waste from the taxpayer's own transfer station facilities to the ultimate disposal sites. Taxpayer Ex. No. 16; Taxpayer Brief, p. 14

d) Dump trailers which transport the combined waste from taxpayer's own transfer station facilities to the ultimate disposal sites. Taxpayer Ex. No. 16; Taxpayer Brief, p. 15

e) Tank trucks - taxpayer purchased this equipment but does not, itself, use them for its own business of waste collection and removal. Although taxpayer asserts that it leases this equipment to an entity (unnamed) which uses them to transport hazardous wastes, there is no documentary evidence supporting this assertion. Taxpayer Ex. No. 16; Taxpayer Brief, p. 15

5. The taxpayer purchased a shredder/trailer for which Retailers' Occupation Tax was remitted to the Department. Notice of Tax Liability XXXXX; Taxpayer Ex. No. 7

6. Taxpayer's customers place waste into taxpayer's containers (dumpsters) placed at the customers' locations. Affidavit, TAXPAYER, p. 6

7. No party from whom the taxpayer collected waste directed the taxpayer to transport the waste to an out-of-state destination.

8. There is no evidence that any party from whom the taxpayer collected waste was aware that the taxpayer had the ability or the authority to travel interstate.

9. Taxpayer takes all of the household waste it collects from its dumpsters at generator (customer) sites and transports it to its own transfer station facilities located in Illinois. Affidavit, TAXPAYER, pp. 5, 6, 7; Taxpayer Ex. No. 4, 5; Taxpayer Brief, pp. 13, 19

10. Taxpayer combines all of the garbage it collects from its various customers at its transfer facilities. Affidavit, TAXPAYER, pp. 5, 7-8

11. The waste taxpayer collects from its containers located at each customer's location becomes fungible with and indistinguishable from all other waste at the taxpayer's transfer station facilities. Affidavit, TAXPAYER, pp. 5, 7-8

12. Taxpayer may legally keep the waste it collects at its transfer facilities for as long as twenty-four hours. Taxpayer Ex. No. 4, 5

13. At its transfer facilities, taxpayer removes the recyclable material from the waste it collects from customers. Affidavit, TAXPAYER, p. 7-8

14. Taxpayer's customers are not paid for recyclables generated from their garbage and extracted by the taxpayer at its transfer station.

15. Taxpayer, itself, is responsible to the State of Illinois for the care and proper maintenance of all of the waste it delivers to its transfer stations. Taxpayer Ex. No. 4, 5

16. Taxpayer determines the ultimate manner (whether or not the waste is to be recycled) and location of the disposal site of the waste it collects.

17. Taxpayer developed and operated, in Illinois, a composting facility for landscape waste. Taxpayer Ex. No. 6

18. In March, 1982 and April, 1990, TAXPAYER[3] was issued an Illinois Commerce Commission Common Motor Carrier of Property Certificate registering TAXPAYER as an intrastate common carrier. Taxpayer Ex. No. 17, 18

19. In February, 1983, the Illinois Commerce Commission issued to TAXPAYER an Exempt Interstate Carrier Registration. Taxpayer Ex. No. 19

20. Taxpayer has no authority to transport hazardous wastes. Affidavit, TAXPAYER, p. 10

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[3]. Taxpayer has failed to provide similar documentation for any of the other taxpayers referenced herein. However, although this is a failure of proof, my conclusions provide that these documents, and the facts found in those specific certificates provided for TAXPAYER, are not determinative of the issue of carrier for hire nor do they support that conclusion for taxpayer's use of the equipment at issue.

21. From November, 1992 through November, 1994, taxpayer held Illinois Special Waste Hauling Permits for certain transportation equipment for the transportation of special wastes. Taxpayer Ex. No. 2, 3

22. Taxpayer concedes that it does not seek exemption for the automobiles which are the subject of Notices of Tax LiabilityXXXXX and XXXXX. Taxpayer Ex. No. 16

23. The parties agree that case no. XXXXX was to be incorporated into XXXXX with the same evidence and brief to apply to both. The equipment at issue in XXXXX fall into the same categories and are used in the same manner as that assessed in XXXXX. Stipulation of Facts, April 26, 1996; Order, April 23, 1996; Affidavit, TAXPAYER, April 25, 1996

24. The parties agree that additional assessments, not yet assigned case numbers, are also consolidated herein, with the same evidence and brief to apply. The equipment at issue in these assessments fall into the same categories and are used in the same manner as that assessed in XXXXX and XXXXX. Stipulation of Facts, April 26, 1996; Motion For Reconsideration And Consolidation; Supplemental Motion For Reconsideration And Consolidation; Second Supplemental Motion For Reconsideration & Consolidation; Third Supplemental Motion For Reconsideration And Consolidation; Affidavit, TAXPAYER, April 25, 1996.

Conclusions of Law:

In its brief taxpayer argues, in the alternative, that the items of tangible personal property sought to be taxed by the Department

qualify for exemption on either of two bases. Taxpayer argues that the transportation equipment qualifies for exemption from the application of tax as the "rolling stock" of an interstate carrier for hire. It also argues that the items of transportation equipment at issue constitute a part of a "system" intended for the primary purpose of disposing of any potential solid, liquid, or gaseous pollutant which if released without such disposal might be harmful, detrimental or offensive to human, plant or animal life, or property, thereby qualifying for exemption from taxation as a pollution control facility under either the Use Tax Act (35 **ILCS** 105/2a) or the Retailers' Occupation Tax Act (35 **ILCS** 120/1a).

Both of taxpayer's arguments fail for the reasons stated below.

A. TAXPAYER'S TRANSPORTATION EQUIPMENT IS NOT EXEMPT AS THE ROLLING STOCK OF AN INTERSTATE CARRIER FOR HIRE

There are several legal premises which are basic to my recommendation. First, it is well-settled in Illinois that tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin, 63 Ill.2d 305 (1976)) with the exemption claimant having to clearly prove entitlement to the exemption. United Air Lines, Inc. v. Johnson, 84 Ill.2d 446 (1981) Additionally, all doubts are resolved in favor of taxation. Follett's Illinois Book & Supply Store, Inc. v. Isaacs, 27 Ill.2d 600 (1963)

With these basic premises in mind, an analysis of taxpayer's argument regarding its right to a tax exemption pursuant to its equipment as "rolling stock" begins with the appropriate statutes and

regulations. The Use Tax Act, 35 **ILCS** 105/3, states, in pertinent part, as follows:

> A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer...

Although there is no question that the purpose of the UTA is to tax all tangible personal property purchased at retail for use in Illinois (Square D Co. v. Johnson, 233 Ill. App.3d 1070 (1st Dist. 1992)) exemptions from taxation exist, with the exemption sought by the taxpayer currently found at 35 **ILCS** 105/3-55(c), which states in pertinent part:

> Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:
>
> ***
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> (c) The use, in this state, by owners, lessors, or shippers of tangible personal property that is utilized by interstate carriers for hire for use as rolling stock moving in interstate commerce as long as so used by the interstate carriers for hire.

Illinois statute further provides that:

> The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports, for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois.

35 **ILCS** 105/3-60

In furtherance of this statutory provision, Department regulation, 86 Admin. Code ch. I, Sec.130.340, states in relevant

part that "[t]he term 'Rolling Stock'...[does not include] transportation vehicles...which are being used by a person...to transport property which such person owns... ."

Based on the evidence, taxpayer uses its tractors, transfer trailers and dump trailers to transport waste material interstate a percentage of the time. The question here is not the interstate/intrastate nature of the trips taken by the transportation equipment, but, rather, whether taxpayer satisfies all of the specifics required by the exempting statutes.

In order for the taxpayer to qualify for the rolling stock exemption the taxpayer must be a "carrier for hire". Taxpayer holds certificates as a "common carrier", which is defined as one "engaged in the transportation of property for the general public over regular or irregular routes." 625 **ILCS** 5/18c-1104(7) Illinois and federal commercial transportation statutes and cases have distinguished carriers for hire from carriers who provide transportation other than for hire.

The Illinois legislature has classified carriers into three groups: common carriers, contract carriers and private carriers. *See, e.g.*, Illinois Commercial Transportation Law, 625 **ILCS** 5/18c-1104(7) (definition of common carrier of property by motor vehicle); 5/18c-1104(8) (definition of contract carrier of property by motor vehicle); 5/18c-1104(27) (definition of private carrier of property by motor vehicle) Intrastate common and contract motor carriers of property are subject to economic regulation by the Illinois Commerce Commission as persons engaged in the business of providing transportation for hire whereas private carriers are not. 625 **ILCS**

5/18c-4102(j); Allied Delivery System, Inc. v. Illinois Commerce Commission, 93 Ill. App.3d 656, 665 (5th Dist. 1981) ("Operation of a motor vehicle in the intrastate transportation of property for hire as either a common carrier or a contract carrier requires a permit of authority issued by the [Illinois Commerce] Commission.")

Similarly, interstate common and contract motor carriers of property for hire are subject to economic regulation by the Interstate Commerce Commission, while private motor carriers are not. Interstate Commerce Commission v. Browning Ferris Industries, Inc., 529 F. Supp. 287, 289-90 (N.D. Ala. 1981) ("Also exempt from the jurisdiction of the ICC is the transportation of property by motor vehicle by a person engaged in a business other than transportation when the transportation is within the scope of and furthers the primary business of that person.") In addition, Illinois case law recognizes the distinction between carriers for hire and private carriers, with the rolling stock exemption to the UT not applicable to private carriers in interstate commerce. Square D Co. v. Johnson, 233 Ill. App.3d 1070, 1081-83

Entities engaged in the business of collecting and removing garbage, such as this taxpayer, have been exempted from the regulations imposed upon carriers for hire by both the Illinois Commerce Commission and the Interstate Commerce Commission.[4]

[4]. Taxpayer acknowledges that it was exempt from the jurisdiction of the Interstate Commerce Commission. Supplemental Aff., ¶3; *See also,* Joray Trucking Corp. Common Carrier Application, 99 M.C.C. 109, 110 (No. MC-126740) (June 29, 1965) (Illinois Commerce Commission decision that carrier of rubble and debris from generator site for disposal was a private carrier exempt from ICC jurisdiction, citing authority that interstate transporters of garbage, refuse and trash are exempt from ICC authority)

Specifically, the Illinois Commerce Commission exempts from its jurisdiction, transportation by motor vehicle of "waste having no commercial value to a disposal site for disposal" (625 **ILCS** 5/18c-4102(i)) as well as transportation by motor vehicle "of waste from the facilities of the generator or the waste to a recognized recycling or waste processing facility when the generator receives no direct or indirect compensation from anyone for the waste and when the transportation is by garbage trucks with self contained compacting devises, roll off trucks with containers, or vehicles or containers specially designed and used to receive separated recyclables, and when the transportation is an interim step toward recycling, reclamation, reuse, or disposal... . *Id*. at 18c-4102(m)

It is clear, then, that entities engaged in the business of transporting for hire,[5] are treated differently than those engaged in the business of collecting garbage.[6] This distinction is clear pursuant to the application of pertinent statutes, regulations and

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[5]. *See, e.g.*, 13 C.J.S. Carriers §385 (1990), which provides:

> A carrier of goods is one who undertakes for hire to transport the goods of another, or who is engaged in the business of carrying goods for others for hire.
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> A shipper or consignor is the owner or person for whose account the carriage of goods is undertaken.
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> Carriers have a duty, vis-a-vis their relationship to shippers, to safeguard the shipper's interests.
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> A shipper of goods must exercise adequate care in packaging and labeling its cargo.

[6]. The fact is, the garbage collection business is profitable because the generator must pay to get rid of it. C & A Carbone v. Town of Clarkstown, N.Y., 114 S.Ct. 1677 (1994) And, the generator gets rid of it by contracting with persons, such as taxpayer, to take the garbage. It does not follow, nor is there any evidence herein, that the customer contracts to have its garbage taken to a specific place, nor to have it taken in any form insuring that it will arrive in a condition satisfactory to the customer.

legal decisions. It is also clear, pursuant to an analysis of all authorities, that taxpayer, a garbage collector and hauler, is not an interstate carrier for hire which qualifies for tax exemption as rolling stock under the UTA.

Taxpayer uses its packer trucks to collect waste at generator sites, removing same to a location of its own choice, that being to one of the two transfer stations which the taxpayer owns in Illinois. All of the waste collected in the packer trucks is further commingled at the transfer station with all of the other waste amassed from prior collections which has as yet not been removed. It is at the transfer station that the taxpayer, not the waste generator, decides whether items are to be recycled and transported to another location pursuant to that determination, or whether the items are to go to a landfill, in or out of Illinois, for disposal by others.

There is no evidence whatsoever that taxpayer's customers contract for, have knowledge of, or care that the taxpayer transports their garbage outside of Illinois. For instance, the "sample" contract provided by the taxpayer and upon which the taxpayer relies, is not a contract. It is but two pages of a "city's" specifications for bids for waste collection and removal.[7] Even assuming that the taxpayer entered into a contract with provisions based on these

[7]. Throughout its affidavits, taxpayer contends that it is in the business of waste disposal. *See, e.g.*, Affidavit, TAXPAYER, p. 2, ¶3 (primary purpose of business is to provide systems and methods for disposing of wastes); ¶4 (types of waste taxpayer disposed of); ¶6 (primary business is appropriate disposal of waste) There is no evidence in this record that taxpayer actually disposes of the waste. It does take the garbage it collects, eventually, to landfills, where the actual waste disposal is done by others, with no evidence indicating that taxpayer, in any way, controls or even participates in the actual disposal.

specifications, taxpayer has specifically not provided that part of its response which identifies, as specifically requested in the bid, the disposal sites to which it can haul the waste. The taxpayer may only have identified its Illinois transfer stations or other intrastate sites and its bidding would, thus, be based upon intrastate rates and costs.

Further, there appears to be no requirement that bidders be interstate carriers or even that taxpayer advised its customers that it had such registration. There is nothing in this record, save taxpayer's own averments, that interstate movement was in any manner anticipated by the customers or that it was part of any contract consideration. In fact, there is nothing in the record to even support the premise that customers primarily contracted with taxpayer to "ship" their garbage, as opposed to having contracted for the primary purpose of garbage collection, and that it was for garbage collection that taxpayer was paid.

These aspects of the record are important in light of the fact that taxpayer admits that it transports all of the waste it collects to one of its two transfer stations, both of which are located in Illinois. If the taxpayer makes that representation to its customers, then the customer is clearly contracting with taxpayer for waste collection and removal, with this activity in Illinois, only.

And, it is only in Illinois that the packer trucks at issue travel. These trucks collect the waste from the generator site and deliver it to taxpayer's transfer stations. That is a totally intrastate activity and it is not unreasonable, given the evidence of record, that this is exactly the service that is contracted for.

Therefore, a determination that the tangible personal property in this matter are not exempt as the "rolling stock" of an interstate carrier for hire does not run afoul of Burlington Northern Inc. v. Department of Revenue, 32 Ill. App.3d 166 (1st Dist. 1975). The issue in the Burlington case was whether equipment, although used solely intrastate, qualified as exempt from taxation as the rolling stock of an interstate carrier for hire.

The Burlington court specifically found that the Burlington Northern was an interstate carrier for hire. *Id*. at 179 It was paid by the public to takes persons and/or property (i.e. passengers, freight, mail) interstate and intrastate with the specific destination chosen by the customer. That court found certain intrastate equipment exempt because Burlington's movements intrastate were so intertwined with its interstate movement and the equipment at issue was necessary for that interstate movement.

These are not the facts in this instant matter. There is nothing of record which indicates that taxpayer's customers know or care that taxpayer travels interstate. There is certainly nothing of record which indicates that any customer hires taxpayer to ship waste outside of Illinois or that it is even contemplated that the waste is taken out of Illinois, taxpayer's assertions notwithstanding.

Taxpayer's customers do not choose the disposal site or even the state in which the disposal site is located. At this time, as taxpayer admits, Illinois has disposal sites. Taxpayer Brief, pp. 21, 42. Therefore, taxpayer is not hired to go interstate, and it is not required to take the waste out of state. The choice to do so is strictly taxpayer's, and it does so only after it has removed any

valuable waste from that collected for its own benefit, not that of its customers. Further, the fact that the taxpayer has interstate carrier registration[8] is not dispositive of the issue of whether it is, as a matter of fact, an interstate carrier for hire qualifying for the pertinent tax exemption. This registration, alone, does not evince how taxpayer actually uses the equipment at issue. First Nat'l Leasing & Fin. Corp. v. Zagel, 80 Ill. App.3d 358 (4th Dist. 1980)[9]

What is of record herein is that the taxpayer not only is not an interstate carrier as is the Burlington Northern, but it does not transport property "for hire". Taxpayer admits that it takes all the waste it collects to one of two of its own transfer stations located in Illinois. All of the waste is dumped there and commingled at these sites.

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[8]. Taxpayer Ex. 17 is its Illinois Commerce Commission Common Motor Carrier of Property Certificate (April 4, 1990) wherein taxpayer represents that it carries, intrastate, construction and building materials, road building materials, construction equipment, fill, sand, stone, gravel and asphalt, in addition to waste. The transport of these properties, if done for hire, are within the jurisdiction of the Illinois Commission. Similarly, Taxpayer Ex. 18 is its Illinois Commerce Commission Certificate of Public Convenience and Necessity as a Common Carrier of Property By Motor Vehicle (March 3, 1982) wherein the taxpayer represented that in addition to non-hazardous waste products, it also carries, intrastate, wood pallets. It is reasonable to assume that taxpayer made the same representations to the Commission in order to obtain an Exempt Interstate Carrier Registration (Taxpayer Ex. No. 19)

The issue before me concerns equipment used only for carrying non-hazardous household waste. Therefore, taxpayer's reliance on these documents to support its position that it is an interstate carrier for hire is diminished, if not misplaced.

[9]. This also applies to the Special Waste Hauling Permits held for certain of its equipment in 1992-1994. There is no evidence of record that the equipment was used for this type of transportation, intrastate or interstate.

It is at these sites that taxpayer elects to hold the waste for up to 24 hours before transporting it to disposal sites. The taxpayer, not the customer, makes the decision to hold the waste at its facility rather than take it directly to a final disposal area. Thus, it is rightfully the taxpayer, not the customer, that is held legally responsible for the proper operation of these transfer stations and for the appropriate care and maintenance of the waste while at these sites. There is no statute or regulation of which I am aware which places any responsibility or liability for the household waste which taxpayer collects onto the customer when the waste is delivered to and held by the taxpayer at its transfer stations.

Also, it is at these sites that taxpayer salvages the recyclable material from the waste. It is not unreasonable to conclude that recycled matter has some salvage value. It is also not unreasonable to expect that the waste generators would be interested in the profits derived from these recyclables. As far as this record is concerned, taxpayer recycles the waste and not only does not report or advise its customers that it is so doing, but, it takes any salvage monies for itself. It appears from these facts, that taxpayer's primary business is not transportation for hire, but is waste collection and recycling.

These are instances of how taxpayer takes complete dominion and control of the waste it collects, and thereby takes ownership of the waste. Because ownership of the waste is no longer in the customer, but, rather, with taxpayer, taxpayer further fails to qualify as a

carrier for hire, as it carries its own property in the equipment at issue.

We begin with a common sense assumption. That is, that customers who place garbage in taxpayer's dumpsters have identified this property as property that they do not want anymore. In fact, it is reasonable to accept, as a general proposition, that abandonment is the bedrock of the garbage collection business, and there is nothing in this record to detract from this basic concept. C & A Carbone v. Town of Clarkstown, N.Y., 114 S.Ct. 1677 (1994) It is a well understood principle of common law that title to abandoned property, as garbage is usually described, is vested in the party in possession. *See* People v. Smith, 203 Ill. App.3d 545 (4th Dist. 1990); People v. Huddleston, 38 Ill. App.3d 277 (3rd Dist. 1976); Hendle v. Stevens, 224 Ill. App.3d 1046,1056 (2nd Dist. 1992)("property abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person")

Taxpayer makes several arguments against this proposition. First, it argues that it has no ownership interest in the waste because it did not purchase it. Taxpayer Brief, p. 48 I find no authority for the position that an ownership interest in tangible personal property can only be had through a purchase. In fact, the Smith and Huddleston cases negate this premise.

Secondly, taxpayer's argument is disingenuous, since it derives an economic benefit from its unilateral decision to recycle some of the waste products at the transfer sites. The ability to do so

necessitates the exercise of an ownership interest. Otherwise, taxpayer would have no right to the profits made therefrom.

Taxpayer further argues that it contracts with its customers for the ultimate disposal of the waste.[10] First, the record does not support this assertion since there is no actual contract in evidence. What is of record is that taxpayer does not transport the waste directly to a final disposal site from the generator site. Rather, it takes the waste to its own facilities where it is legally responsible for the proper handling of the matter and is required by law to remove it from its own property within a specific period of time. Should it fail to do so, it is the taxpayer, not the customer, who is charged with any violation. Nor has the customer contracted for the recycling which taxpayer conducts on the collected matter. Additionally, the customer's waste is no longer identifiable as it has been commingled with that of taxpayer's other customers.[11]

I also note that the taxpayer does not "dispose" of the waste it collects despite its averments to the contrary. What is eminently clear is that the taxpayer transports the waste from a generator site

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[10]. *See, e.g.*, Affidavit, TAXPAYER, ¶3 (primary purpose of business is to provide systems and methods for disposing of wastes); ¶4 (types of waste taxpayer disposed of); ¶6 (primary business is appropriate disposal of waste) Taxpayer's conclusion as to its primary business purpose is not accepted as fact. There is no evidence in this record that taxpayer actually disposes of waste. This is discussed further, *infra*.

[11]. This raises some interesting points. For instance, if the taxpayer spills waste along its collection route thereby violating laws, it is the taxpayer that is liable for the clean-up, for no other reason then the waste is commingled and is not identifiable with a particular customer; should the taxpayer not find a final disposal site for the waste it collects, it cannot return the waste to its customers, again, if for no other reason then all of the waste has been commingled and cannot be identified with a specific customer.

to its transfer station and from there to where actual disposal takes place. Except for some landscape waste which the taxpayer transports to its compost facility in Illinois, there is nothing of record to conclude that once the waste is at a disposal site this taxpayer has any part of the disposal process. Although there are regulations concerning how the taxpayer transports the waste, these are not to be confused with the statutes and regulations governing the actual disposal of the waste to which the taxpayer is not amenable. Indeed, once the garbage is "dumped" at its ultimate destination, taxpayer plays no further part in the actual disposal process.

As to the issue regarding the common law premise of garbage being abandoned matter and the property of whomever takes possession, taxpayer relies on the case of Moreco Energy Inc. v. Penberthy-Houdaille, 682 F. Supp. 933 (N.D. Ill. 1988) to support its position that the waste it collects differs from garbage left at curbside. Taxpayer's reliance on this case is, however, misplaced.

In Moreco, plaintiff and defendant contracted for plaintiff to remove used motor oil from defendant's facility. Plaintiff collected the oil and placed it in its own storage facility. Plaintiff ascertained thereafter that defendant's oil contained polychlorinated biphenols (PCBs), deemed by statute, to be "hazardous waste", thereby requiring specialized handling, storage and disposal. Plaintiff immediately demanded that defendant pick up its hazardous waste. Defendant refused, claiming that once the plaintiff picked up the oil, defendant relinquished ownership of the PCBs.

The court did not permit the defendant to prevail. Its refusal was based on facts distinguishable from those herein. First, the

plaintiff in Moreco did not contract for the disposal of defendant's hazardous waste. Thus, the court found the plaintiff to be an innocent party which received and took control of the complained of waste without knowledge or consent.

Additionally, there exist statutes and regulations detailing the proper procedures for storing and disposing of hazardous waste such as the type in Moreco. Therefore, that court found that to allow the defendant to rely on the common law of abandonment to relinquish its ownership in the particular waste would be in contravention of the policies underlying the Toxic Substance Control Act and corresponding federal regulations.

These are not the facts herein. Although the taxpayer makes much of the fact that there is some hazardous-type waste in the ordinary household waste it contracts to collect, none of this waste is defined as "hazardous" under statutes or regulations, nor is this household waste subject to the same special provisions regarding its handling, storage or disposal. Further, taxpayer admits that it is not registered to transport hazardous waste. Taxpayer, then, cannot have it both ways. It cannot profess to collect such waste and thereby identify with the plaintiff and the facts in Moreco, and still maintain its operation without the necessary registration and without abiding by the detailed regulations concerning the transport, storage and disposal of "hazardous waste".

The Moreco plaintiff was an "unwilling recipient of toxic material, thrust upon it in breach of contract". *Id*. at 938 Taxpayer herein, however, collects exactly the waste it expects and contracts to collect, that is, common household waste. The plaintiff

in Moreco prevailed because the law did not allow the common law principles of ownership to apply regarding waste plaintiff was not contracted to collect. Implicit in the Moreco holding is that, ordinarily, garbage is owned by the one that is paid to collect it. And, that is the case at issue.

Therefore, for the reasons stated above, I find that the taxpayer's customers have in fact abandoned (indeed, it may be inferred that they contract to abandon) the waste material this taxpayer collects and carries. Taxpayer, the one in possession of that abandoned property, and the entity that exercises total dominion and control of the waste material, is the owner of the waste. Thus, its movements from generator sites to its own transfer stations to out of state disposal sites are movements of a private carrier, not "for hire" as mandated by statute[12] and Department regulation. *See* Joray Trucking Corp. Common Carrier Application, *supra* (Interstate Commerce Commission ruled that carrier was a private carrier "who carried on its own behalf in the performance of a disposal service"

[12]. The pertinent statute exempts rolling stock used by an interstate carrier for hire "if the rolling stock transports, for hire", persons or property whose shipments originate or terminate outside Illinois. 35 **ILCS** 105/3-60 The Department's regulation does not include as rolling stock tangible personal property used to transport property owned by the taxpayer. 86 Ill. Admin. Code ch. I, Sec. 130.340(b). Taxpayer argues that by such an exclusion, the Department exceeds its regulatory authority. Taxpayer Brief, p. 46

I do not agree. The statute specifically states that the rolling stock must transport, "for hire". "Hire" as a verb, is defined as "[t]o purchase the temporary use of a thing, or to arrange for the labor or services of another for a stipulated compensation." Black's Law Dictionary, 5th Ed. As a noun, "hire" is defined as compensation for the use of a thing, or for labor or services... . A bailment in which compensation is to be given for the use of a thing, or for labor and services about it." *Id*. *See also*, Joray Trucking Corp. Common Carrier Application, *supra* I conclude that the Department regulation is consistent with statutory parameters.

where carrier transported for disposal ruble and debris excavated during construction projects, and where the hiring contractors did not select where the carrier took the debris for disposal)

Once the Department has submitted its *prima facie* case, the taxpayer has the burden of showing by competent evidence, based upon books and records, that it is entitled to the exemption. Sprague v. Johnson, 195 Ill. App.3d 798 (4th Dist. 1990) Taxpayer has failed to accomplish this in that it has been unable to show that it is an interstate "carrier for hire".

B. TAXPAYER'S TRANSPORTATION EQUIPMENT DOES NOT QUALIFY FOR THE POLLUTION CONTROL FACILITIES EXEMPTION

There is no argument that this taxpayer transports waste material. Taxpayer argues that the pollution control facilities exemption (35 ILCS 105/2a)[13] is to be broadly read to include the garbage collection and removal equipment at issue. However, Illinois courts recognize that this statutory exemption is limited in scope and, contrary to taxpayer's arguments, does not extend to everything or anything which touches pollutants or potential pollutants.

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[13]. That provision provides, in pertinent part:

> §2a. "Pollution control facilities" means any system, method, construction, device or appliance appurtenant thereto sold or used or intended for the primary purpose of eliminating, preventing, or reducing air and water pollution as the term "air pollution" or "water pollution" is defined in the "Environmental Protection Act", enacted by the 76th General Assembly, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without such treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property.

This taxpayer argues that its transportation equipment is essential to a system of the disposal of pollution. In furtherance of this argument the taxpayer avers that pertinent case law indicates that the specific exemption statutes anticipate a wide variety of pollution control methods and systems, including appurtenant appliances which, themselves, do not directly reduce or eliminate pollution.

Unfortunately, the taxpayer misreads the cases it relies upon and ignores basic exemption law. As stated, *supra*, in Illinois, tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin, *supra*) and may not be extended by judicial interpretation or implication. Follett's Illinois Book and Supply Store, Inc., *supra*. The exemption claimant has the burden to clearly and conclusively prove entitlement to the exemption (United Air Lines, Inc. v. Johnson, *supra*) with all doubts being resolved in favor of taxation. Follett's Illinois Book & Supply Store, Inc. v. Isaacs, *supra* Therefore, the pollution control facilities exemption is not to be broadly read, nor have the courts done so.

Also, Illinois courts recognize that the legislative intent underlying this specific exemption is, with limitations, to encourage business and industry expenditures that "would result in environmental improvement and to soften the burden on those who are required to make such expenditures." (emphasis added) Illinois Cereal Mills, Inc. v. Department of Revenue, 37 Ill. App.3d 379, 382 (4th Dist. 1976); Central Illinois Public Service Co. v. Department of Revenue, 158 Ill. App.3d 763, 766 (4th Dist. 1987) (hereinafter

referred to as "CIPS") In addition, the courts have agreed that the equipment referred to in the statute are that which have "no substantial function in the manufacturing or processing of a product other than to abate the pollution caused by the plant operation." Illinois Cereal Mills, Inc. v. Department of Revenue, *supra* at 381-82; Accord, Shell Oil Co. v. Department of Revenue, 117 Ill. App.3d 1049 (4th Dist. 1983).

Most importantly, in order to qualify for the exemption, the "system, method, construction, device or appliance appurtenant thereto" (35 *ILCS* 105/2a) must be sold, used or intended for the "primary purpose of eliminating, preventing, or reducing air and water pollution" (emphasis added) (*id.*) or for the "primary purpose of treating, pretreating, modifying or disposing" of any potential pollutant. (emphasis added) *Id.*

The "primary purpose" test seeks to determine, in an objective fashion (Shell Oil Co. v. Department of Revenue, *supra*; CIPS, *supra*), the "function and ultimate objective of the equipment alleged to be exempt", and that "[o]nly those facilities directly involved in the pollution abatement process are to be afforded special tax status." CIPS, *supra* at 768. Further, tax exempt status is denied where the property's pollution control use is secondary or ancillary to its primary purpose. Shell Oil Co. v. Department of Revenue, *supra*; CIPS, *supra*.

This "primary purpose" mandate is applied and followed specifically by every Illinois court, save one. To begin, in the case Columbia Quarry Co. v. Department of Revenue, 154 Ill. App.3d 129 (5th Dist. 1987), the court exempted from taxation limestone

which was added to a scrubber to act as the filter absorbing air pollution. That court found that the scrubber's "primary purpose" was to eliminate air pollution, and that without the limestone, the scrubber "simply would not operate to reduce air pollution." *Id*. at 132. That court found, outright, that the limestone's sole purpose was pollution control.

That is not the case here. The primary, in fact, the sole purpose of the taxpayer's transportation equipment is to do just that, transport waste from the place of its creation to another location. Affidavit, pp. 7, 8, 9, 10, Ex. 1 at 2, 3; Taxpayer Brief, pp. 13, 14, 19, 20, 21, 22, 26, 43-44, 45 Consistent with that analysis and the result in Columbia Quarry are the Illinois decisions in Illinois Cereal Mills, Inc. v. Department of Revenue, *supra* (gas fired boilers not exempt because objectively, the primary purpose was for steam to dry grain and for heat for the plant); Shell Oil Co. v. Department of Revenue, *supra* (asphalt storage tanks not exempt because objective primary purpose was to enable Shell to produce a certain type of asphalt and to burn certain pitch as fuel)

In fact, in CIPS, *supra*, the appellate court found that the railway cars at issue were not exempt because the equipment's objective, primary purpose was to transport minerals, albeit necessary ones, to the pollution control system. Taxpayer herein attempts to distinguish this decision from this instant matter by stating that the railway cars in CIPS were not disposing of pollutants but were bringing needed material to the pollution generator. Taxpayer fails to recognize, however, that the materials brought by the railway cars were essential to the very function of

the scrubber system which was essential equipment required to contain, if not to specifically eliminate the pollution generated by the polluter. And, the railway cars were essential to the pollution prevention process because the materials they carried were essential elements to that process. Even so, the railway cars were not exempt as a "system" for pollution control because their primary purpose was transportation and not actually pollution abatement or control.

The court's focus in CIPS was exactly that of the other Illinois courts, that is, what is the objective, primary purpose for the equipment alleged exempt. In this instant matter, as in CIPS, the objective, primary purpose, as repeatedly admitted by the taxpayer, is to transport, by its own choice, the waste material from the generator site to its own transfer stations and then to the disposal site. As in CIPS, it may be necessary to remove waste from one area to another where it is safely disposed of, however, that does not change the objective, primary purpose and use of taxpayer's transportation equipment. That purpose is to transport. Taxpayer's equipment does not eliminate pollution. It moves waste material from one place to another. It does not prevent pollution. Taxpayer does not generate pollution nor does anything to prevent waste from deteriorating and becoming harmful. Rather, it transports garbage to other sites where recyclable matter is removed and then to locations where proper landfill construction and disposal methods prevent pollution of the remaining material. The equipment cannot reduce pollution as compacting does not in anyway change the character or nature of the waste. Compacting simply allows the taxpayer to place more waste into its trucks for more efficient use of its means of

private carriage to either its transfer stations or to the landfill. The equipment at issue does not treat, pretreat or modify pollution. It just transports it from one place to another. Nor does it dispose of it as the equipment just takes the material either to a transfer station or to the landfill where other equipment is used specifically to create the proper waste disposal receptacle.

Further, in each case where the exemption was considered, the court was not concerned with whether or not the law or necessity required the equipment. Again, the courts looked at the objective, primary purpose for the equipment, and, if objectively, the primary purpose was for pollution control, the courts allowed the exemption.

Taxpayer continually makes the argument that "but for" the transportation of the waste that it provides, there would be waste everywhere and there would be hazard to people, property etc. As compelling as this argument may be, it has been rejected by Illinois courts.

The Illinois appellate court in Illinois Cereal Mills, Inc. v. Department of Revenue, 37 Ill. App.. 3d 379 (4th Dist. 1976), in denying the pollution control equipment exemption to gas fired boilers used in plaintiff's corn processing mill, stated that the words of the exemption "refer to equipment such as precipitators, filters, and smoke stacks which have no substantial function in the manufacturing or processing of a product other than to abate the pollution caused by the plant operation." *Id*. at 381-182. That court made its decision in spite of the fact that the polluter put the gas fired boilers into operation to replace coal boilers which the EPA charged were causing improper air pollution, and had

threatened the plaintiff with action to force compliance with statute.

In accord with Illinois Cereal Mills, is the appellate court decision in Shell Oil Company v. Department of Revenue, 117 Ill. App.3d 1049 (4th Dist. 1983). That court denied the pollution control facilities exemption to storage tanks which were installed in order to comply with EPA sulphur emission requirements. That court found that, although the storage tanks were required for compliance with EPA regulations, the primary purpose of the tanks was to enable the plaintiff "to produce asphalt from high sulphur pitch and burn the low sulphur pitch as fuel in the refinery." *Id*. at 1053.

Necessity, therefore, is not the standard for determining qualification for this exemption. In fact, the only court which has granted an exemption to equipment because it was necessary to satisfy EPA requirements is that in Central Illinois Light Co. v. Department of Revenue, 117 Ill. App.3d 911 (3rd Dist. 1983). This decision concerns an electronic truck scale, "purchased in order to weigh trucks loaded with the ash [a pollutant] so that compliance will be had with highway weight requirements. ...[I]f it were not for environmental pollution regulations there would be no need for the scales." *Id.* at 915. That court, then, applied a subjective, "but for" test in determining whether equipment qualified for the exemption. That is, the court qualified a particular piece of equipment because regulations set forth certain requirements and the equipment at issue impacted on those requirements.

The value of Central Illinois Light case is questionable, since, not only has no other court followed it for this *obiter dicta*, but,

it has specifically not been followed. *See* CIPS, *supra.* No other court has followed it because the pollution control facilities exemption statutes set forth the objective, "primary purpose" standard by which questioned equipment is judged. And, were we to give credence to the "but for" test suggested here, we would be granting exemption to garbage cans and garbage bags "but for" which household waste could not be contained, the initial step to its ultimate disposal.

All of the above are consistent with the decisions in Du-Mont Ventilating Co. v. Department of Revenue, 73 Ill.2d 243 (1978), and Beelman Truck Co. v. Cosentino, 253 Ill. App.3d 420 (5th Dist. 1993). In Beelman, the appellate court allowed the pollution control facilities exemption for escort trucks and safety supplies used to load, unload, follow and clean up the hazardous waste transported by the taxpayer. The primary, if not the only purpose, as determined by that court, for the safety equipment (plastic liners, etc.), was to contain the hazardous waste and to prevent the waste from contaminating surrounding areas in the event of spills and such.

As to the exemption for the escort trucks, the Beelman court distinguished those items from the transporting railroad cars in CIPS and Beelman's own dump trucks, which that taxpayer conceded were not exempt as pollution control facilities, by indicating that the sole purposes for the dump trucks and railroad cars were for transportation.[14]

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[14]. The Beelman court stated, in pertinent part:

> Lastly, it is worth noting that the railroad cars in CIPS are actually more analogous to the dump trucks used to haul the hazardous waste

From the record, it would appear that the escort trucks were employed, at the very least, if not solely, for purposes of carrying the manpower and the equipment necessary to prevent the spread of the hazardous waste.[15] In coming to its decision, the Beelman court

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because the sole purpose of both is to transport matter. (emphasis added)

Beelman Truck Co. v. Cosentino, *supra* at 425 In its Brief, taxpayer places importance on the fact that in Beelman, the Department did not assess the dump trucks, and, therefore, the issue of their taxability was not before that court. Taxpayer Brief, p. 25

Taxpayer is correct in that the issue of the taxability of the dump trucks was not at issue in Beelman. However, for taxpayer to suggest, as it does, that the issue has therefore been conceded by the Department, is misleading and incorrect.

It is clear from the briefs filed in the appellate court that there was no question between the parties that the dump trucks did not qualify for the pollution control facilities exemption. Beelman, in its appellate court brief, stated that it "does not claim that the dump trucks are pollution control devises." Appellee's Brief, p. 11; Appellant's Reply Brief, p. 7 The specific facts concerning the Beelman trucks may be very different from those herein, thus, the Department's failure to assess the dump trucks could be because those trucks qualified under another exemption. Taxpayer herein attempts to find exemption under several theories. The Beelman taxpayer, while conceding that it does not qualify under a particular statutory exemption, obviously succeeded in qualifying under another, whereas the instant taxpayer has not.

[15]. A major distinction between Beelman and this instant matter is that the equipment at issue in Beelman concerned hazardous waste, which is clearly defined and heavily regulated by statute. The equipment at issue herein is used to transport ordinary household waste. Perhaps that fact is what underlies that court's decision on the escort trucks, which is an aberration in light of all other precedent cited throughout this Recommendation. *See* Shell Oil Company v. Department of Revenue, 117 Ill. App.3d 1049 (4th Dist. 1983) (exemption denied for storage tanks required to be installed to comply with EPA sulphur emission requirements, as the primary purpose of tanks was not pollution control) The Beelman court's distinctions between the escort trucks and non-exempt railway cars are clearly strained, if not totally without substance. It is yet to be seen whether courts will follow Beelman on this point, or will decline to use it as precedent as they do with the Central Illinois Light Co. case.

The question of Beelman's precedential value is further impacted by the fact that, in Beelman, the Department failed to respond to taxpayer's affidavits attached to its summary judgment motion. Thus, all facts averred by that taxpayer were deemed true, including the taxpayer's representations of the primary use of various equipment. That is not the case here. There is no evidence of record to support

relied heavily upon *dicta* in the case of Wesko Plating, Inc. v. Department of Revenue, 222 Ill. App.3d 422 (1st Dist. 1991). In that case, the court permitted the pollution control facilities exemption for chemicals used by the taxpayer, an electroplating company, to reduce or eliminate the pollution it created. The Department rejected Wesko's claim to the exemption on the basis of a Department regulation, which specifically excluded chemicals, as opposed to mechanical equipment, as exempt under the pollution control facilities statute. The Wesko court found that, just as in Columbia Quarry, the chemicals used by Wesko directly acted to reduce or eliminate pollution, and, in fact, the equipment that actually did the pollution controlling operated only through these chemicals. The Wesko court allowed the exemption of the chemicals by suggesting that the statutory words "system" and "method" are broad terms, which would not preclude additives, such as chemicals, as exempt equipment. However, those terms, and the language in Wesko and Columbia Quarry which speak of "diverse means" and a "wide variety" of pollution control methods and systems have not been read to mean "all", "anything" or "everything" which has to do with refuse disposal, as this taxpayer would conclude.

Wesko does not suggest that the primary purpose test, or any of the other legal or statutory principles set forth in prior cases, must not be followed. Wesko does not suggest that the entire statutory provision must be given a broad reading, as this taxpayer

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taxpayer's conclusion as to the primary purpose of the equipment at issue other than its use solely for the transportation of waste from one location to another. I am not required to, nor do I, accept conclusory statements and representations made in affidavits or in taxpayer's brief where there are no documents in support thereof.

and the Beelman court offer, because to do so would be to ignore well-established case law and public policy which mandate narrow readings for exemptions. Telco Leasing, Inc. v. Allphin, *supra;* United Air Lines, Inc. v. Johnson, *supra.* On the contrary, Wesko states that the primary purpose of the chemicals was for pollution control, and, from the facts as reported, the sole purpose of the chemicals was for direct pollution control.

The same applies to the Du-Mont Ventilating case, wherein the Illinois Supreme Court affirmed an appellate court decision applying the pertinent exemption to the intake side of a push-pull ventilation system. First, the taxpayer seeking the exemption was the pollution creator and the ventilation system was on its own premises. Further, the ventilation/pollution control system at issue in that case consisted of an intake side, an exhaust side and a dust collector. As stated by the Court, the record showed that if the exhaust side of the system did not work, the building became pressurized. If the intake side of the system did not work, no air would be brought into the building, and the exhaust side would cease to function, with the result being that air pollutants would not be exhausted. Additionally, if the intake side functioned alone, the air pollution in the building would merely be blown around the inside of the facility.

The Department denied Du-Mont the exemption on the intake side of the system because, *inter alia*, this part of the system was not physically connected to the exhaust side or the dust collector. The Court determined that the intake side was part of the facility's integrated pollution control system, and, therefore physical

connection was not necessary. In determining this, the Du-Mont court applied the primary purpose test to assess the objective purpose of the installation of that part of the equipment. And, the facts of that case are that the primary, not ancillary or secondary, function of the equipment for the intake side was for the control of the pollution.

These facts are distinguishable from those herein. Taxpayer spends a great deal of time discussing how transportation of the waste to and from its transfer stations is an essential, integral part of pollution control. For instance, taxpayer argues that transportation to the transfer stations is necessary for efficient consolidation of the waste and efficient transportation of it to the landfills with minimal impact on traffic. However, as discussed, *supra*, transporting the waste to the transfer stations may permit more efficient transportation of the waste to the ultimate disposal sites, but the waste is not changed or treated in any way to make it less of the waste product that it is.

Nor is the waste disposed of at the transfer stations. The law recognizes that the commingled waste at the transfer stations remains untreated, unmodified, undisposed of waste and, thus, regulates the taxpayer in the construction, operation and maintenance of those premises. In essence taxpayer's packer trucks move waste from one place to another with no change in the matter. Further, they do not even move the waste to an essential location as transportation to the transfer station is a choice made by the taxpayer for convenience and efficiency of its own private operations.

Regarding the transportation of the waste from the transfer stations to the final disposal sites, again the objective, primary purpose of the transportation equipment is to move the waste from one location to another as an incident to and in furtherance of taxpayer's primary business of collecting waste. The waste is not treated, changed or disposed of during the transportation. Although transportation is necessary to take the waste to a location where it is disposed of, that is no more the standard for ascertaining tax exempt status then the transportation of the necessary chemicals to the pollution control equipment was not accepted as the standard for qualifying the CIPS railway cars for the tax exemption.

If taxpayer prevails in its argument that its waste collection and removal equipment qualify for the pertinent exemption because it is a part of a "system" of pollution control, the exemption would then apply to any tangible personal property involved with possible pollutants or offensive material. There is no indication that the legislature contemplated such a result. On the contrary, as mentioned above, this is specifically not the position of the vast majority of Illinois courts. Instead, abiding by the basic premise that the exemption is strictly construed against non-taxability and may not be extended by judicial interpretation or implication (Follett's Illinois Book and Supply Store, Inc. v. Isaacs, 27 Ill.2d 600 (1963)) courts have denied the exemption to that property which, although necessary to the pollution control process, and which impacts on that process, is not used "primarily" for the actual pollution control. To do otherwise, and to grant the exemption to the transportation equipment at issue, would be to expand the

exemption to include virtually all tangible personal property which is involved, ancillarily or secondarily, in refuse removal, regardless of the equipment's objective, primary purpose. This result negates basic tax law and is contrary to precedent set by diverse court decisions.

For the reasons stated herein, it is my recommendation to the Director of the Illinois Department of Revenue that the Notices of Tax Liabilities at issue in case no. XXXXX be affirmed except as to the following: 1) for Notice of Tax Liability No. XXXXX, which I recommend should be cancelled because the tax has been paid to the Department; 2) the parties agree (Stipulation of Facts, April 26, 1996 ¶¶ 4, 6) that the equipment assessed and given the docket no. XXXXX were assessed in XXXXX and I recommend that these assessments, as found in Appendix C of the Stipulation of Facts of April 26, 1996, be cancelled; and 3) the parties agree (Stipulation of Facts, April 26, 1996, ¶¶ 3, 6) that the assessments which are the subject of the motions for reconsideration and consolidation are for equipment already assessed in case no. XXXXX and I recommend that these assessments, as found in Appendix B of the Stipulation of Facts of April 26, 1996, be cancelled.

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Mimi Brin
Administrative Law Judge